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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1088

COREX CORPORATION, dba QUICK CORPORATION OF AMERICA
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner and petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, entered on October 7, 1975, which reverses the judgment of the United States District Court, Central Division of California, in favor of the petitioner, and order denying a petition for rehearing dated January 5, 1976.

OPINIONS BELOW

The opinion of the United States District Court is reported in 362 Fed. Supp. 1065, and is attached to this petition as Appendix "A" pages 1-7.

The opinion of the United States Court of Appeals for the Ninth Circuit, infra, page is reported in 524 F.2d 1017, and the opinion is printed in Appendix "B," pages 1-9.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

1. Were the Findings of Fact of the District Court clearly erroneous under Rule 52(a) of Rules of Civil Procedure where the facts found by the District Court were undisputed and supported by substantial evidence?

2. Did the Court of Appeals err in holding that the District Court was required, as a matter of law under Rule 16 of the Federal Rules of Civil Procedure, to pursue issues of fact which were not set forth in the pre-trial conference order?

3. Whether the petitioner, or another firm (Jon H. Importing Company) was the bona fide importer within the contemplation of Title 28 Section 4161 of the Internal Revenue Code of 1954?

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4. Did the substitution of Jon H. Importing Company as the importer, in the place of Corex, the previous importer, alter the tax base so as to avoid the payment of any tax due on the imported fishing tackle?

5. Was Jon H. acting as a mere agent or conduit of Corex as a dummy in order to avoid a higher excise tax?

6. Were there arms-length transactions between the importer and distributor or just a cover-up to avoid taxes?

STATUTE INVOLVED

The statutory provision involved in Section 4161 of the Internal Revenue Code of 1954 (26 U.S.C. §4161, 1964 Ed.).

> "There is hereby imposed upon the sale of fishing rods, creels, reels, and artificial lures, baits, and flies (including parts of accessories of such articles sold on or in connection therewith, or with the sale thereof by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold."

STATEMENT

This is an action under 28 U.S.C., Section 1346(a)(1), for the recovery of excise taxes paid, which the Government contends, and petitioner denies, that it is the importer within the meaning of Section 4161 of the Internal Revenue Code of 1954, and subject to a tax of ten percent (10%).

The following facts were undisputed and supported by substantial evidence:

D.A.M.'s principal place of business was in Berlin, Germany, and manufactured fishing reels and lures which were imported into the United States (Cl. T. p. 65) by Anton W. C. Denker,[1] whose place of business was Hamburg, Germany, and was the sole distributor and exporter of D.A.M. fishing tackle (Cl. T. p. 75, Pl. Exs. 4-5 Vol. II 36-38.)

Petitioner (Corex)[3] was a California corporation, with its principal place of business in Costa Mesa, California, and was not owned by D.A.M., but by Phil Greyshock, a 25% stockholder, and by Lutze Kuntze and Rupert Kuntze who, between them, owned the balance of 75% of the issued stock and who had a part interest in D.A.M., which was not a corporation, but an association.

Shortly after its formation, Corex, pursuant to an agreement with Denker, became the importer of D.A.M. fishing tackle (Vol. IV, R.T. pp. 42, 136). Corex continued to be the importer until the summer of 1968, during which time the Gladding Company, a separate unrelated entity, was the distributor of the D.A.M. products.

The Gladding Company decided to get out of the business of distributing the D.A.M. reels and supplies

[1]Anton W. C. Denker hereafter designated as Denker.

[2]Vol. I, R.T. through Vol. IV references are to Reporter's Transcripts. Cl. T. refers to Clerk's Transcripts.

[3]Corex Corporation hereafter designated as Corex.

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because it was going to manufacture a similar product (Vol. III, R.T. p. 137).

Denker, the exporter, who had no financial interest in D.A.M. or the Corex, made the decision to substitute Corex in the place of the Gladding Company as the distributor, and Jon H. Importing Company[4] as the importer in the place of the Corex.

John Nessley formed John H., and was owned by Ruth Nessley, his wife, who was doing business under a fictitious name (C.T. p. 75, Pl. Ex. 15 Vol. II 178).

Under an agreement entered into, dated August 1, 1968, Denker appointed Jon H. the sole and exclusive importer of D.A.M. fishing tackle. The term of the agreement was to be as long as Jon H. provided reasonable and satisfactory performances of importing said product (Pl. Ex. 2, ¶2), Vol. II 26, whose responsibility was to promote and import the D.A.M. products into the United States.

Jon H., after written appointment by Denker, entered into a distributor agreement with Corex, which provided, among other things (Pl. Ex. 1 Vol. II 25.)

(1) Corex shall have first option of D.A.M. fishing products imported by it (Jon H.). However, in the event Corex did not exercise its option, then John H. had the right to sell to the other distributors or outlets (¶ 2).

[4]Jon H. Importing Company hereafter designated as Jon H.

(2) All prices were on the basis of C&F duty and excise tax paid Los Angeles Harbor or Customs warehouse, based on shipment by ocean vessel. If the shipments were by air, air-freight, costs would be added, together with delivery charges from airport to Costa Mesa (¶ 5).

(3) Payment of Jon H.'s invoices were to be made by Corex by a portion on receipt of merchandise and balance as agreed, depending on market conditions and availability of credit (¶ 6).

(4) Neither party had the right to act for or obligate the other (¶ 7).

Corex had no financial interest in Jon H., and exercised no control over Jon H.'s operations, and Jon H. was a separate entity (Vol. II, R.T. p. 122, l. 1 to l. 2, p. 124). There was not any evidence of a change in the tax base effected by the substitution of Jon H. as importer in the place of Corex, nor was there any evidence that the appointment of Jon H. as the importer, in the place of Corex, was motivated for the purpose of avoiding taxes.

The Government never challenged the relationship between Corex, when it was the importer and Gladding, the distributor. The only real difference in the facts here, is that Jon H. was substituted as the importer in the place of Corex, who had been the importer when Gladding was the distributor.

Jon H. established a line of credit with the Crocker

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Bank in the amount of $25,000 by putting up a certificate of deposit in the amount of $10,000 (Pl. Ex. 41, Vol. II, R.T. p. 54, l. 1 to l. 2, p. 96), and had an income of $23,419 and $26,915 in 1968 and 1969 as an employee of the Zerwekh Company, Custom brokers (Vol. III, R.T. p. 85, l. 19 to l. 2, p. 86; of Exs. "A" and "B" Vol. III 165-166.) The amount of capital of Jon H. was not significant, because it had credit from Denker, and its operating expenses were low.

Jon H. subjected and exposed itself to the following risks, among them being:

(1) Liability in the amount of $100,000 on a term bond executed in favor of the United States, in which it was provided under paragraph (1) that in the event of failure to deposit duties and taxes imposed or by reason of importation of the articles he shall pay to the District Director of Customs as liquidated damages in amount equal to the value of the merchandise, plus taxes and duties thereon. Other liabilities for damages were provided in paragraphs (2) and (3) (Pl. Ex. 3 Vol. II 32)

(2) Payment to Denker for the merchandise imported.

(3) Payment of insurance.

(4) Losses not covered by insurance.

(5) Brokerage fees.

(6) Payment of excise taxes and duties.

(7) Warehousing.

(8) Warfage and handling charges.

(9) Change in appraisement of merchandise by Customs, none of which was passed on to Corex.

(10) All other costs and expenses of importation (Vol. II, R.T. p. 98, l. 8 to l. 14, p. 103, l. 22 to l. 6, p. 104, Pl. Ex. 18 Vol. II 194.)

((1) Jon H. filed the Special Customs Invoice Form No. 5515, invoices from Denker to Jon H. and bills of lading showing Denker as the seller and Jon H. as the purchaser (Pl. Ex. 11 Vol. II 156.)

An importer who files these documents with Customs for entry vouches for the truth of these documents, together with all other documents which are required to be filed with each entry.

The presentation of false documents, by whomever prepared, subjects the importer to severe penalties under Section 592 of the Tariff Act of 1930, Title 19, Section 1592, U.S.C.

This is another important risk which subjected Jon H. to both civil and criminal penalties for filing false documents.

Corex had no financial interest in Jon H., and exercised no control over Jon H.'s operations, and Jon H. was a separate entity (Vol. II, R.T. p. 122, l. 1 to l. 2, p. 124).

Jon H. initiated a credit arrangement with Denker

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in order to increase the business by making a greater number of reels available to the market (Vol. III, R.T. p. 41, l. 23 to l. 7 p. 42).

Jon H. ordered from Denker without first consulting Corex by agreeing to accept all of the fishing tackle that Denker would ship. This was done on the basis of an annual projection from Denker of the fishing tackle available. Purchase orders were not issued by Corex to Jon H. until Jon H. had received notification from Denker of the portion of the annual projection of the fishing tackle that had been shipped at a given time (Vol. III, R.T. 144-163).

Jon H. solely fixed the per unit price of the fishing tackle in August of each year, and was based upon Customs duties, excise tax, freight and other charges. This price remained the same for the entire season (Pl. Ex. 22, Vol. II pp. 171-176).

The amount of Jon H.'s profit was not a fixed fee or percentage, but was over and above the importing charges and cost of the merchandise, which varied because some of the fixed costs of importation were the same regardless of whether there was a large or small shipment and other costs, such as warehousing, that were not passed on to Corex.

Corex did not participate in any manner in causing the shipment of the fishing tackle from Germany to Los Angeles, and had no interest of any kind prior to its arrival at the dock in Los Angeles, at which time

it exercised its right to accept or refuse the imported merchandise.

Jon H., and not Corex caused the imported fishing tackle to be released from Customs and Customs bonded warehouse (Vol. II, R.T. p. 113, 11. 9-22; Vol. III, R.T. p. 127, 11. 17-25). All of the brokerage fees and importation costs were not provided by Corex before receipt of the merchandise, as Jon H. paid with its own funds a total of $48,628.34 importation costs for this period (Pl Exs. D-1 and D-2). Vol. III 167-168.

The sale of the fishing tackle to Corex was intended to take place at the dock after release from Customs, and the transfer of title was at that time (Vol. III, R.T. p. 111, 1. 17 to 1. 8, p. 113; Vol. III, R.T. p. 125, 1. 24 to 1. 11, p. 126).

There was not any evidence that the procedures followed by Jon H. in bringing the fishing tackle into the United States were not in accordance with Corex's position that Jon H. was the importer.

Jon H. in order to increase sales gave Corex a promotional allowance of $354.00 to promote sales of spools and line (Vol. II, R.T. p. 122, 11. 2-9; Ex. 42). Vol. 2 Rt. Pl. Ex. 42, p. 85 Jon H.'s efforts to increase sales is evidenced by the fact that the sales tripled in 1969 over 1968 (Vol. II, R.T. p. 108, 11. 9-11. Pl. Ex. 20; Vol. II, 197; Vol. III, R.T. p. 129, 11. 5-11).

In addition, he made suggestions to increase sales with reference to merchandising fishing tackle in re-

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tail stores and, as a result, Corex did employ a man to assist the retail outlets in displaying and selling of packaged reels, hook and line (Vol. II, R.T. p. 124, l. 4 to l. 25, p. 125).

John Nessley made surveys of the financial market and advance customer trends in order to determine quantities of reels to purchase for a given year (Vol. III, R.T. p. 122, l. 17 to l. 17, p. 123).

Jon H. had other customers to whom it sold merchandise which was refused by Corex. They were Western Hoege, Johnson Drug Co., Boston Camping Distributing Company and Thrifty Drug Co. (Pl. Exs. 28-31, incl.). Vol. II 95-97.

The Court of Appeals mistakenly contrary to the fact held it was error for the trial court not to pursue any inquiry into the substance of the transaction, as required by *Import* and *Sony,* in that the District Court's findings were silent (1) on capitalization of Jon H., (2) how importation was actually financed, (3) who first dealt with the importer, (4) what ties existed between appellee and the exporter, and (5) whether Jon H. served a purpose other than procuring appellee's order.

The Court of Appeals may not make its own findings of fact, but nevertheless did so by premiseing its decision on the following:

1. Corex was owned by D.A.M.. the manufacturer, and was the importer initially.

2. Jon H. had no other clients. Nessley, operator of Jon H. was a full-time customs broker of Zerwekh.

3. Jon H. was established for the purpose of performing Corex's importing function.

4. Jon H. had minimal assets and was paid a small commission.

5. Unsecured credit was extended to Denker by Jon H. All brokerage fees were paid by funds provided by Corex.

6. Jon H. performed minimal promotional activities. (A. "B" p. 8)

The District Court of Appeals mistakenly, and contrary to fact, concluded as a matter of law that by applying *Import* and *Sony,* Jon H. was not the importer because it did not perform substantial promotional activities and bore none of the usual risks, performed no function other than a conduit, and earned little profit.

The District Court did consider these issues, and made its Findings of Fact and Conclusions of Law according to the evidence and applicable law (Vol. IV. R.T. p. 60).

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THE DISTRICT COURT WAS BOUND BY THE ISSUES OF FACT WHICH WERE SET FORTH IN THE PRE-TRIAL CONFERENCE ORDER, AND WAS NOT REQUIRED TO PURSUE ANY OTHER ISSUES:

Rule 16, of the Federal Rules of Civil Procedure provides:

> "The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any matters considered and *which limits the issues for trial to those not* disposed by admission or agreements of counsel; and such order when entered controls the subsequent course of action unless modified at the trial to prevent manifest injustice." (Emphasis added.)

Local Rule 9(g), paragraph VI, sets forth the form of the Pre-trial Conference Order.

The stipulated issues of fact, and no others, remaining to be litigated upon the trial were:

"ISSUES OF FACT AGREED UPON BY PLAINTIFF AND DEFENDANT:"

> "1. For each of the taxable quarters in suit, was the plaintiff, Corex, the importer of D.A.M. fishing lures and reels within the meaning of Section 4161(a) of Title 26, United States Code.
>
> 2. For each of the taxable quarters in suit, was the plaintiff Corex, the inducing and efficient cause of the importation of D.A.M. lures and reels into the United States.

3. For each of the quarters in suit, was the plaintiff, Corex, the first purchaser resident in the United States who arranged as principal and not as agent for D.A.M. fishing lures and reels to be imported into the United States.

4. For each of the quarters in suit, did the plaintiff, Corex, have title to the imported D.A.M. fishing lures and reels before they entered into the geographic United States and at the time they cleared Customs.

If not, when did the plaintiff, Corex, acquire title to the imported D.A.M. fishing lures and reels.

5. For each of the quarters in suit, did the Jon H. Importing Company acquire title to the imported D.A.M. fishing lures and reels.

If so, when did the Jon H. Importing Company acquire this title.

6. For each of the quarters in suit, did the plaintiff, Corex, assume any risk of loss for the imported D.A.M. lures and reels it acquired.

If so, when did the plaintiff, Corex, assume any risk of loss.

7. Did the plaintiff, Corex, make any advance payments to the Jon H. Importing Company prior to the time the imported D.A.M. fishing lures and reels were delivered to the plaintiff, Corex.

8. Did the plaintiff, Corex, withdraw from Customs or the Customs bonded warehouse the imported D.A.M. lures and reels it acquired."

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"ADDITIONAL ISSUES OF FACT PROPOSED BY THE PLAINTIFF, NOT AGREED TO BY THE DEFENDANT:

"1. Did the plaintiff, Corex, assume liability for the payment of the imported articles to Anton W. C. Denker and the expenses of importation, including the execution of General Term Bonds required to be posted by importers.

If the plaintiff did not, who did.

2. Did the plaintiff, Corex, pay Anton W. C. Denker for the imported articles it acquired; the sea and air freight; the marine insurance; the duty; the excise tax; the brokers fees; the warehousing; the wharfage; the transportation from the dock to the warehouse and the losses not covered by insurance.

3. Was the plaintiff, Corex, in the business of fabricating and distributing fishing poles for each of the quarters in suit."

"ADDITIONAL ISSUES PROPOSED BY THE DEFENDANT, NOT AGREED TO BY THE PLAINTIFF:

"For each of the quarters in suit, did the plaintiff, Corex, supply all funds necessary to accomplish the importation of the D.A.M. lures and reels into the United States (Clk. Tr. pp. 72-73)."

At the beginning of the trial, the District Court posed as some of the factual issues for determinination, the following:

1. Whether Jon H. was a bona fide importer.

2. Was the merchandise withdrawn from the bonded warehouse by Corex or Jon H.?

3. Was Jon H. acting as the mere agent or conduit of Corex, as a dummy, as a means of getting around a higher tax that would be charged on the sale price?

4. Was there a principal and agent relationship between the importer and the distributor?

5. Was there arms-length transaction between the importer and distributor, or just a cover-up to avoid taxes?

6. The paper-work, formation of the companies, and how they got started, financing contracts of importation.

7. Who pays freight, insurance, and costs.
(Vol. 1, R.T. pp. 5-14).

The Government did not, at the trial, challenge these issues.

Here we have an extensive record of the business transactions, the effect of dual interest of the owners of a partial interest in D.A.M. and Corex, motives, plans, and purposes of the parties which are revealed by the conversations, memoranda, documents, and accomplished acts.

At the conclusion of all of the evidence, the District Court again analysed all the evidence (Vol. III, R.T. pp. 216 to 241).

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The oral opinion of the Court shows a careful analysis of all of the evidence presented by the parties, and an evaluation of the controlling legal principles set out by the Revenue Rulings 67-209, 68-207, 69-393, and *Wholesalers* and *Sony*.

The District Court stated that while the documentary and legalistic evidence is not final, it must look at the realities; that in looking at the realities, it considered everything, all the evidence, testimony, legal documents between the parties, schedules drawn up by the Government, bank accounts, checks, arms-length dealings, and business considerations involving the importer and the exporter and the distributor; whether the importer was merely an agent, a conduit for a fixed fee; sales from Denker to Jon H., and sales from Jon H. to Corex; the investment, control by Corex of the operations, financial, economic business policies, or otherwise, over Jon H.; the selection of Jon H.; the withdrawal of the merchandise from the bonded warehouse; the law of sales between two persons or corporations, residents of the United States; the law of sales as to when title passed, and schedules of the Government.

The District Court compared these facts and others with those of *Sony*, and concluded they were not within those of either *Handley* or *Wholesaler Importer*, and found from a consideration of the undisputed evidence, as a whole, that Jon H. was the importer purchaser from Denker; seller to Corex; paid the Customs duties, all importation costs, excise taxes; obtained his

own line of credit; had own bank account; put in his own capital; made the payments to Denker from his own bank account; was liable to Denker for the purchase price; obligated for risk of any losses, term-bond, insurance, broker's fees, wharfage, and warehousing. John H. made up its own price list, and everything pointed, beyond a reasonable doubt and preponderance of the evidence, that Corex was not the importer. (Vol. IV. Rt. pp. 6-69).

Actually, the law is well settled that the Internal Revenue Service is free to disregard form when it contravenes substance—but only when it does contravene substance. Put another way, form, absent exceptional circumstances, reflects substance. The District Court found no exceptional circumstances, and it is this finding of fact that was the real issue before the Court of Appeals.

In the recent decision of *Edwards* v. *Commissioner,* 415 F.2d 578 (Cir. 10th 1969), it expressed quite forcefully the legal principles that special circumstances are required before courts will disregard arms-length business dealings of the parties.

> "It is, of course, true that the contractual form of a transaction cannot control the imposition of a tax liability when the realities of the transactions show that form does not represent a bona fide and actual agreement. But it is equally true * * * that the dignity of a contractual right cannot be set aside simply because a tax benefit results either by design or accident".

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In *Sony,* at page 1266, it distinguishes the facts in *Import,* stating, "Its functions did not compare in importance with those in the instant case."

It is also quoted at page 1261, from *Higgins* v. *Smith,* 308 U.S. 473, as follows:

> "While defendant is free to disregard form when it contravenes substance, it may not do so where substance does in fact exist."

Accordingly, form and substance in the case are, therefore, one and the same; and hence, the excise tax should be based on the sale between Jon H. and petitioner Corex, which was the first sale in the United States.

Petitioner's case was based on the genuine economic foundation in substance for the transactions as they were carried out. Jon H.'s place in the chain of title was proper, and its designation as the true importer was valid not only in form, but also in substance.

Jon H., in fact, arranged as principal, and not as agent, for petitioner Corex to import the taxable articles into the United States.

The Government did not come forward with any evidence that there was a tax benefit to petitioner by the substitution of Jon H. by Denker in its place as the importer.

The District Court found no such exceptional circumstances in the instant case, and that all the trans-

actions between petitioner Corex and Jon H. were at arms length.

The findings of the District Court were neither impossible nor inherently improbable. Indeed it was the only finding which it could make on the evidence before it.

No inference or presumption properly could be drawn from evidence that was not presented by the Government and outside the issues set forth in the pretrial conference order.

The Court of Appeals decision is in conflict and, in effect, departs from Rule 16 of the Federal Rules of Civil Procedure, which limit the District Court from going into any other issue than presented by the pretrial conference order.

THE COURT OF APPEALS MAY NOT SET ASIDE A JUDGMENT OF THE DISTRICT COURT UNLESS CLEARLY ERRONEOUS

Rule 52(a) of the Rules of Civil Procedure states:

> "Findings of Fact shall not be set aside unless clearly erroneous."

Various utterances of the Supreme Court and Courts of Appeal have emphasized the limited scope of appellate review under this rule.

Bellevue Gardens, Inc v. *Hill,* 297 F.2d 185, 186; (C.A. D.C. 1961)

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United States v. *Oregon State Med. Soc.* 1952, 343 U.S. 326, 72 S.Ct. 690;
United States v. *Yellow Cab Co.* 1949, 338 U.S. 338, 70 S.Ct. 177.

Under the clear and erroneous standard of review, the question is not simply whether the reviewing court would have found otherwise, but whether the reviewing court could permissibly find as it did.

Glapion v. *M. S. Journalist,* 487 F.2d 1252, 1255 (5 Cir. 1973)
Brown v. Ciggie & Millie, Inc., 485 F.2d 1293, 1295 (5 Cir. 1973)

At page 47, Vol. IV, R.T., the District Court in the instant case states:

> "and if anybody was inducing the importation, it was certainly Jon H. He was the one who wanted to build it up and Jon H. is the one that wanted to sell all that he could, and then get all he could from Denker, and then turn around and ask COREX how many did they want because they had the right of first refusal, and what he didn't want he would sell to anybody else."

It is also axiomatic that uncontradicted testimony must be followed.

Chesapeake and Ohio Railway Co v. *Martin,* 283 U.S. 209, 216, 217.

The Court of Appeals must view the evidence in the light most favorable to the party who prevailed

below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the trial court, sitting without a jury, must be accepted unless they are clearly erroneous; they cannot be upset if they are supported by substantial evidence.

Pacific Queen Fisheries v. *Symes,* 307 F.2d 700, 706 (9 Cir. 1962);

Stacher v. *United States,* 258 F.2d 112, 116 (9 Cir. 1958); Cert. den. 358 U.S. 907.

The findings of fact of the District Court are correct, and an Appellate Court does not revaluate the evidence nor substitute its judgment for the District Court's first hand evaluation.

Lindsay v. *McDonnell Douglas Aircraft Corp,* 485 F.2d 1288, 1289 (8 Cir. 1973);

J A Jones Const. Co. v. *Englert Eng. Co.,* 438 F.2d 3, 5 (6 Cir. 1971);

Crowe v. *Cherokee Wonderland, Inc.,* 379 F.2d 51, 53 (4 Cir. 1967).

The ultimate test as to the adequacy of findings is always whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. *Carr* v. *Yokahama Specie Bank Limited,* 200 F.2d 251, 255 (9 Cir. 1952).

Elaborate and detailed findings and conclusions are not necessary. *Trentman* v. *City and County of Denver,* 236 F.2d 951, 953 (10 Cir. 1956).

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Although the Court of Appeals might have concluded differently from the District Court, it is not its function to review the evidence *de novo*. *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 123; 89 S.Ct. 1562, 23 L.Ed. 2d. 129 (1969); *Panaview Door & Window Co* v. Reynolds Metal Co., 255 F.2d 926. (9 Cir. 1958).

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous," but on the contrary, in effect, held that it differed with the Court only as to the ultimate inferences to be drawn from the evidence in that the findings were silent as to the certain specific facts set forth on page 1020 of the opinion. (A. "B" 9)

In order to hold that a finding is clearly erroneous, the reviewing court on the entire evidence must be left with the definite and firm conviction that a mistake has been committed.

In applying this test, the powers of the Court of Appeals are not unlimited, and the mistake must be clear and convincing that a reasonable man could not have made the finding. If the mistake concerns conflicting evidence which permits of alternate inconsistent inferences, the Court of Appeals cannot substitute its inference for the one drawn by the District Court.

See *McAllister* v. *United States,* 348 U.S. 19, 20, 22, 23 (1954):

United States v. *United States Gypsum Co.,* 333 U.S. 364, 394 (1948).

In the instant case there was not any conflict in the evidence, and the findings of the court faithfully incorporated the sole evidence on the matter—it is not based on an inference, but exclusively on fact, and consequently there is neither the necessity nor propriety of the Appellate Court to resort to the inferences or presumptions which it did in this matter, and the Appellate Court had no power to do so.

Even if it were the function of the Court of Appeals to make new findings or draw an ultimate inference, it could base the same only on the evidence presented, and not that which the Government failed to present.

THE COURT OF APPEALS INCORRECTLY INTERPRETED SONY, IMPORT, AND REVENUE RULING 69-207:

The decision of the Court of Appeals is in conflict with *Sony,* 428 F.2d 1258, where the facts are materially similar to those in the instant case. However, in some respects, the facts in the instant case are much more favorable to appellee.

In *Sony,* 100 shares of 101 shares of Sony of America were owned by Sony of Tokyo, one share being owned by Irving Sagor. President of Agrod Electronics, Inc. Denker, the foreign exporter, had no interest in the manufacturer D.A.M., the importer Jon H., or in the distributor COREX.

In *Sony,* there was an exclusive distributor agreement with only one client, the terms of which were

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similar, except that COREX had first refusal and Jon H. did actually sell to others. *Sony* paid a fixed commission of 3% of the selling price, and was invoiced together with F.O.B. value of goods, customs duty, bond charges, and excise tax, all of which were included in the invoice. Jon H.'s compensation was a varied profit over and above cost of the merchandise and importation costs.

Jon H. incurred all the obligations provided in the general term given to Customs for entry of the merchandise in the amount of $100,000 (Pl. Ex. 3, Vol. II 32) and assumed all of the risks and liabilities connected with the importation of the merchandise (Vol. II, R.Tr. pp. 98 to 104, incl.).

Agrod's capital stock was $1,500; whereas Jon H.'s was $1,000, but it had established a line of credit with the Crocker Bank in the amount of $25,000 (P. Ex. 4, Vol. II 36). Agrod's staff consisted of two clerical employees and four individuals with knowledge of radio and electronics. Jon H.'s help consisted of his wife, a part-time bookkeeper, and himself. He had no need for more. Jon H. had warehouse facilities available in the Customs Bonded Warehouse. (Pl. Ex. 17, Vol. II, 71, Df. Ex. D2 Vol. III, 168)

In *Sony,* the subdistributor used a letter of credit to pay for the merchandise. Denker, the exporter, by extending credit, financed the payment of the merchandise and accomplished the same purpose as the letter of credit.

The lengthy credit extended by Denker was substantially reduced to within 10 days of arrival of goods in October 1969 (Pl. Ex. 33 Vol. II, 98). Agrod was part of the chain of title the same as Jon H. *Sony* does not hold that an importer must have the independent ability to pay for the merchandise nor finance the distributor.

On the contrary, it did not find any objections to the method of payment of the merchandise by the subdistributor, Sony of America, who opened a letter of credit with its bank in favor of Agrod at the time of placing an order. Agrod used the same bank, and would immediately assign the letter of credit in favor of Sony Tokyo. In effect, payment of the merchandise was guaranteed by Sony Corporation of America, and its bank issued the letter of credit prior to shipment from Japan.

In *Sony,* at page 1267, the Court found that all the contracts involved demonstrate arms-length bargaining:

> "There can be no question that the contracts between Mr. Gross and Sony Tokyo were at arms length and based on sound business considerations as were those between Mr. Gross, Agrod, and Delmonico.
>
> "The fact that these contracts were basically continued throughout with different parties is very persuasive, as is the fact that the government apparently accepted Agrod as the importer when Delmonico was the designated subdistributor."

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The appellant never challenged the relationship between COREX when it was the importer, and Gladding the distributor, and the only difference in the facts here is that Jon H. was substituted in the place of COREX as the importer.

The District Court made substantially the same finding of fact as in *Sony* (Clk. Tr. No. 9, p. 161). The authority of *Sony* has not been challenged by any later decisions.

In *Import Wholesale Corp.* v. *U.S.*, 368 F.2d 577 (Ct. Cl. 1966), the substance of the transaction was to supply it with a method of importing VWs into the United States. Deeren supplied none of the funds for importation. Its only act was to place the order for plaintiff for a stipulated fee of $5.00 per auto, which was made directly to Deeren, and *Import* would pay directly all costs and expenses incurred by Deeren in importing VWs. The only insurance was a bearer policy. Deeren had not issued stock, no assets or credit, and no paid-in capital.

Deeren assumed no risk and bore no responsibility, and the Court disregarded the alleged importer because it served basically as merely a name of record, and there was absolutely no business purpose for its existence.

It did not use any of its own funds, or assume any of the risks that Jon H. did. Actually the primary motive for Deeren's existence was to save excise taxes.

There is not any evidence that the appointment of Jon H. as the importer was motivated for the purpose of avoiding taxes, for the reason that there was no showing that any taxes were saved when he became the importer in the place of COREX. When COREX acted as the importer, obviously it was compensated for the services which it performed in importing the goods, which were sold to the distributor Gladding. The small profit realized by Jon H. did not result in any tax benefit to COREX when it became the distributor, which is further demonstrated that competitors reels were selling at lower prices than were "QUICK" reels (Pl. Ex. 25, Vol. II p. 28).

In the Revenue Ruling 69-207, "(Z)" did not assume any of the risks of a typical importer. Its compensation was 2%, which was added to the landed cost of the merchandise. The only purpose for which Jon H. was established, was to take over the functions of a pre-existing importer. In the Revenue Ruling, the motive for creating "(Z)" was tax avoidance.

Jon H.'s operations met all the tests set forth in Revenue Ruling 69-207, 1967-1 Cum. Bull. 179. It exposed itself to, and assumed all the risks involved in importing merchandise. Jon H. was a separate unrelated entity, and it was only obligated to offer the imported merchandise for acceptance or rejection.

The merchandise was sold Ex. Dock. Pl. Ex. 12 Vol. II 41 shows check register of Jon H. payment of duties to bank, Crescent Warehouse, telephone, and

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other incidental expenses. (Pl. Ex. 18, Vol. II 86) shows losses paid by Jon H. to COREX. Because of the differences in fact, Revenue Ruling 69-207 is not applicable to Jon H.'s situation.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with the applicable decisions of this Court, and conflicts with the decisions of the United States Courts of Appeal, and with its own controlling decisions, and with decisions of other Circuits, among them being but not limited to:

McAllister v. *United States,* 349 U.S. 19, 20 (1954);

Zenith Corp. v. *Hazeltine* 395 U.S. 100, 123 (1969);

United States v. *United States Gypson Co.,* 333 U.S. 364, 395 (1948);

Guzman v. *Pichirilo,* 369 U.S. 698, 702 (1962)

Carr v. *Yokohama Specie Bank, Ltd.,* 200 F.2d 251 (9 Cir. 1952);

Brown v. *Ciggie & Millie, Inc.,* 485 F.2d 1293. 1295 (5 Cir. 1973);

Lindsay v. *McDonnell-Douglas Corp.,* 485 F.2d 1288 (8 Cir. 1973);

Glapion v. M. S. Journalist, 487 F.2d 1252, 1254 (5 Cir. 1973);

Bianchini v. *Humble Pipe Line Co.,* 480 F.2d 251 253 (5 Cir. 1973);

Bellevue Gardens, Inc. v. *Hill,* 297 F.2d 185, 186 (C.A. D.C. 1961);

Panaview Door & Window Co. v. *Reynolds Metals Co.,* 255 F.2d 820 (9 Cir. 1958).

The decision of the Court of Appeals in this case, if permitted to stand, departs from the usual course of judicial proceedings under Rule 16 of the Federal Rules of Civil Procedure, and will substantially alter the procedures in actions tried in the District Court, in which uniformity of statutory interpretation is of utmost importance as a guide for the expeditious judicial administration by all District Courts.

The question is of great public importance and, in principle, affects civil cases in which reviewing courts may set aside a finding of fact of the trial court and substitute contrary findings solely because the issues of fact were not set forth in the pre-trial conference order, in contravention of Rule 16, and the scope of review is materially changed from that prescribed by Rule 52(a) and by the decisions of this Court.

The question involved as to who is the importer under 28 U.S.C. 4161, Internal Revenue Code of 1954, is of utmost importance as it affects a great number of importers and is in conflict with the holding in *Sony*, 428 F.2d 1258, and it will disrupt imports into the United States as it is common practice for all distributors, jobbers, and chain-store operators to use importers to bring in merchandise for them to the United

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States and secure payment by letters of credit or sight drafts therefore leaving no clear guidance in law for importers to follow in the operation of their businesses.

Respectfully submitted,

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